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[76] *Id.* at 527.

[77] In this case, the waiting time was two steps removed from the productive activity on the assembly line and is therefore not "integral and indispensable" to a "principal activity."

[78] *Id.* at 527.

FIRST AMENDMENT RIGHTS OF FACULTY AND STUDENTS: A PERSPECTIVE

by

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INTRODUCTION

Assume a faculty member at a public college is reprimanded by her department chair for the following reasons: she is told that her explanations to her students are unclear. In a recent class she taught, she gave 13 incompletes. When students approach her about making up the incomplete, she does not explain how to successfully complete the course. The students complain to her chair and she is given a reprimand and eventually not re-hired.

The faculty member sues the college. She alleges infringement of her rights to free speech and academic freedom "in retaliation for her refusal to comply with a request that she communicate more clearly to her students what was required to complete the coursework in a class she taught in the fall of 2000."[1]

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Is this the sort of issue that the framers of the Constitution envisioned when they approved the Bill of Rights? Faculty members often assert that they "have First Amendment rights" yet few agree on exactly what those rights are. While there is a consistently held belief that discussions in the classroom are protected, do those rights encompass the "right *not to explain* class material;" or the "right to have personal discussions"? And what of the students' rights? Does the First Amendment mean that students can "say anything they want" in the name of academic freedom? And do faculty have a right to remove a student from a classroom if they find the students' speech disturbing or upsetting?

The purpose of this paper is to examine issues of free speech as they apply in the classroom. It will examine these issues both as they pertain to statements by faculty in the classroom, for which they receive some form of "punishment" as well as statements or actions by students.

PART I. FACULTY FREE SPEECH AT PUBLIC COLLEGES AND UNIVERSITIES

Historically, courts have held that at a public college or university, "faculty may not be terminated for the content of their classroom speech, so long as it is consistent with the purpose of the course."[2] The rationale is that an institution cannot limit a public faculty member's right to speech, or terminate a faculty appointment for speech expressed in the context of the citizen role or about a public issue."[3] Language, however, is not protected if, "taken in context, it constitute[s] a deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification."[4] The First Amendment does not protect public college faculty in vulgar and profane

speech where the words are not "germane to the subject matter" or in violation of the college's sexual harassment policy.[5]

In the seminal case of *Pickering v. Board of Education*,[6] the Supreme Court ruled that school board officials in Will County, Illinois, violated the First Amendment rights of a public high school teacher when they fired him for writing a letter to the editor of the local newspaper criticizing the board of education for its allocation of school funds between athletics and education. The Court ruled that "[i]n determining a public employee's rights of free speech, the problem is to arrive "at a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[7] "Whether a public employee's speech addresses a matter of public concern," so as to protect an employee from termination for expressing those views "must be determined by content, form and the context of a given statement."[8]

There are deeply ingrained societal reasons for protecting faculty speech. Justice Brennan noted in *Keyishian v. Board of Regents*, [9] "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The classroom is peculiarly the 'marketplace of ideas.'" [10] He warned how dangerous it would be to "impose any strait jacket upon the intellectual leaders in our colleges and universities."[11] "The nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[12]

Free speech in the classroom is not unfettered. Like any public employee, the courts analyzing the dismissal of faculty at public colleges and universities employ a four part test in determining whether that dismissal is protected speech.

> "The first step is to determine whether the speech is protected, i.e., on a matter of public concern. If so, the second step is to balance the employee's interest in commenting on matters of public concern against the government employer's interest in promoting efficient government services. If that balance is struck in favor of the employee's interest, the third step requires the employee to demonstrate that his speech was a substantial or motivating factor in the adverse employment action. If the employee so demonstrates, the fourth step considers whether the government employer has proven that it would have taken the same adverse employment action, even in the absence of the protected speech. The first two steps are legal questions which the court resolves to determine whether the speech is constitutionally protected. The second two steps concern causation and involve questions of fact."[13]

Is the speech a matter of public concern?

The courts differentiate between speech that is personal in nature, and thus unprotected, versus speech that is a matter of public concern and thus protected.[14] What constitutes a matter of public concern is generally related to a "political, social or other matter of community concern,"[15] as enunciated in *Connick v. Meyers*.[16] Here, the respondent, an Assistant

District Attorney, was informed that she would be transferred to a different section of the criminal court to prosecute cases. She strongly opposed the transfer and distributed a questionnaire around the District Attorney's office. She was terminated for refusing to accept the transfer and told that the distribution of the questionnaire was an act of insubordination. The court found that this was not a matter of public concern. "Myers did not seek to inform the public that the District Attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of *Connick* and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo.[17] The Court recognized that an assistant district attorney's speech related to official pressure to work on a campaign was a matter of public concern because it was "a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal."[18] Speech, however, that deals with 'individual personnel disputes and grievances' and that would be of 'no relevance to the public's evaluation of the performance of governmental agencies' is generally not of 'public concern'."[19]

Other protected speech can be characterized as that which serves a purpose, such as speech which "discloses any evidence of corruption, impropriety, or other malfeasance on the part of [state] officials, in terms of content, clearly concerns matters of public import " [20] in comparison to speech that is "calculated to redress personal grievances." [21]

Hulen v. Yates[22] involved a dysfunctional accounting department at Colorado State University (CSU). The department was fraught with in-fighting and accusations of

unethical behavior. The plaintiff "cooperated with other members of the Accounting Department in seeking to revoke the tenure of a colleague (Dr. William Mister) on grounds of plagiarism and copyright violations, emotional abuse of students, abuse and harassment of staff, misuse of state funds, receipt of kickbacks from a publisher in return for adopting textbooks, and other charges"[23]. Hulen "attempted to bring his concerns to the CSU Administration. He wrote memos to the provost about the lack of an investigation, and made statements about unethical behavior that he perceived going on in the department.[24] In one memorandum, he wrote, "Yet the very cornerstone of our profession of accounting involves ethical behavior and integrity. We cannot successfully teach ethics if it is not practiced at CSU."[25] The administration asked Dr. Hulen to stop its investigation of Dr. Mister. When he refused, Dr. Hulen was removed from the accounting department and placed in the management department, in which he was not qualified to teach any courses, "thereby resulting in a diminished ability to attract research funds, publish scholarship, receive salary increases, teach summer tax classes, and obtain reimbursement for professional dues and journal subscriptions."[26]

The court found that this was exactly the type of speech worth protecting. "The speech in this case fairly relates to charges at a public university that plainly would be of interest to the public. "[T]eachers whose speech directly affects the public's perception of the quality of education in a given academic system find their speech protected [under the First Amendment]."[27]

Many times the action of the professor is mixed with some protected and some non-protected activities. For example, in *Blum v. Schlegel*,[28] a law school professor wrote letters to his fellow faculty members relating to his quest for

tenure and promotion, and a letter making suggestions about school policy and curriculum. The letters regarding the professor's particular status for tenure and promotion were held not to "relate in any way to any political, social or other matter of community concern....Moreover, many of these letters make clear that plaintiff was writing merely as a disgruntled employee complaining of a personal employment dispute."[29]

In *Hudson v Craven*,[30] an economics professor at Clark College encouraged her students, as part of a class assignment, to attend the World Trade Organization (WTO) meetings/protests in Seattle. These protests were highly publicized in the area and attracted international attention. When the college learned of her plans to take the students to a potentially dangerous event, the college admonished her that she could not do so. She sued, claiming that her First Amendment rights were violated, but the court disagreed. "While Hudson's freedom to participate in discussion about the WTO surely implicates core political speech, the actual curtailment of her First Amendment rights was minimal. Hudson was free to attend the anti-WTO rally on her own. She was free to communicate her views on the WTO to her students or to anyone else. She was free to associate with her students in the classroom on this matter. The only claimed abridgement of her First Amendment rights was that she was not permitted, under the de facto auspices of the College, to associate with a handful of students during a discrete event for a limited duration."[31]

This case is an excellent example of when the "legitimate administrative interests of Clark College" strongly outweighed the professor's associational interests. The court also espoused language helpful in determining when faculty's first amendment rights can be legitimately curtailed. These include:

(1) risks to students, particularly an underage group, and potential liability for the college, because of the reports of potential for violence;
(2) students who were not able to attend would not have the benefit of access and networking with teachers;
(3) mixing one's politics with one's professional responsibility in the classroom, which is a special trust; [and] (4) marginal benefit from participating in the demonstration.[32]

The court found that, "This litany boils down to two reasons: student safety and pedagogical oversight. While some of these justifications are more significant than others, on balance the legitimate interests of Clark College as an employer and educational institution outweigh those of Hudson to participate in the de facto field trip with her students."[33] Clark College met its burden by demonstrating that its legitimate interests outweighed Hudson's interest in attending the anti-WTO rally with her students.

Was the speech a substantial or motivating factor?

The plaintiff's second hurdle is proving that the speech was a "substantial or motivating factor" in the employment decision. In *de Llano v. Berglund*,[34] a faculty member criticized numerous administrative decisions including rising salaries of administrators and poor spending policies of administrators. The plaintiff met the first requirement, that the issue be one of public concern, but he failed to satisfy the second requirement. He could not prove that his speech is what caused his dismissal. The court stated that, "We are unable to ascertain any evidence that he was terminated because of the letters he wrote to the various venues. The dismissal notice given to de Llano outlines a number of reasons for his termination and

those reasons were substantiated in two separate hearings. Not one of the reasons stated for his termination related to de Llano's letters. The fact that de Llano publicly criticized college administrators, and that some of the criticism is constitutionally protected, is insufficient to carry his burden of establishing that the letters were a substantial factor in the termination decision."[35] The unfortunate reality of this case is that the review boards or administrators hearing these types of complaints can choose their words carefully. By not stating that any of the reasons for dismissal are due to the exercise of speech, the plaintiff will have a difficult time prevailing on the issue of causation.

Since the *Pickering* decision, the Supreme Court has significantly modified its analysis of first amendment rights of civil or public employees which are applicable, therefore, to faculty employed at public institutions. In *Waters v. Churchill,*[36] the plaintiff, a nurse, complained to others in the hospital about co-workers as well as the running of the hospital. Ultimately, she was fired and she sued claiming her speech was both protected and non-disruptive. Here, the court stated that the right to speak is also limited if it *may cause disruption, not if it actually did.* "Whittled to its core, *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech. [37] In addition, when weighing the value of the employee's speech against the interference with government operations, the *Waters* plurality also indicated that a government employer need only show that the speech is *likely to be disruptive* before the speaker may be punished.[38]

In *Jeffries v. Harleston* [39] one of the few cases to interpret *Waters*, the plaintiff, was the chairman of the Black Studies department at CUNY. In delivering a speech he made derogatory statements about the public school curriculum, Jews and the history of black oppression. As a result, the CUNY Board of Trustees voted to reduce his chairmanship from three to one year. Jeffries sued, claiming that his demotion was based on the speech, and thus protected.

But the court, applying the criteria set forth in *Waters*, disagreed. The court held that the defendants did not violate Jeffries' free speech rights if: (1) it was reasonable for them to believe that the Albany speech would disrupt CUNY operations; (2) the potential interference with CUNY operations outweighed the First Amendment value of the Albany speech; and (3) they demoted Jeffries because they feared the ramifications for CUNY, or, at least, for reasons wholly unrelated to the Albany speech. [40] Because there was a potential for disruption, the court found, that, as a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the Albany speech might have had.

There is also a clear line of cases involving faculty members engaged in inappropriate language and/or behavior as unprotected activity. For example, suppose that a professor uses profanity in the classroom. In spite of warnings from the dean, the instructor continued to make derogatory statements towards his students about their attitude in his class, some of which included the words "hell," "damn," "bullshit," and "sucks."[41] After two students filed written complaints concerning the professor's speech, the dean initiated action, approved by the board of trustees, to terminate the appellant.

The appellant argued that his language was not obscene, and that he had been exercising his First Amendment right to use profane language. Furthermore, he argued that his First Amendment right to "academic freedom" permitted such language. The Supreme Court affirmed the district court's decision that a publicly employed college teacher is not constitutionally protected in the offensive use of profanity in the classroom. In fact, the court found that professors hold a unique position. "We view the role of higher education as no less pivotal to our national interest. It carries on the process of instilling in our citizens necessary democratic virtues, among which are civility and moderation. It is necessary to the nurture of knowledge and resourcefulness that undergird our economic and political system. Repeated failure by a member of the educational staff of Midland College to exhibit professionalism degrades his important mission and detracts from the subjects he is trying to teach."[42]

Furthermore, "there was no doubt that the appellant's outbursts did not address a matter of public concern."[43] As previously stated, the indecent language appellant used described his attitude toward his students, "hardly a matter that....would occasion public discussion." The Court ruled that the "appellant has not argued that his profanity was for any purpose other than cussing out his students as an expression of frustration with their progress—to 'motivate' them—and has thereby impliedly conceded his case under *Connick*."[44]

In *Bonnell v. Lorenzo*, [45] the plaintiff was suspended for his use of vulgar and profane language in his literature class. He filed a suit against the president of Macomb Community College alleging, among other things, that his freedom of speech was violated. College officials met with the plaintiff who defended his use of the language by stating that it was used to highlight the "'chauvinistic degrading attitudes in

society that depict women as sexual objects, as compared to certain words to describe male genitalia, which are not taboo or considered to be deliberately intended to degrade.'"[46] After the meeting, the College gave the plaintiff a written warning that stated in part:

> Unless germane to discussion of appropriate course materials and thus a constitutionally protect act of academic freedom, your utterance in the classroom of such words as 'f**k,' 'c**t' and 'p***y' may serve as a reasonable basis for concluding as a matter of law that you are fostering a learning environment hostile to women."[47]

After subsequent complaints of vulgar and profane language in class, the College reprimanded and then suspended the plaintiff for a period of time. The Court concluded that the plaintiff had no constitutionally protected right to use vulgar and profane language in his English composition class because it was "not germane to the subject matter." [48] The court stated that "Plaintiff may have a constitutional right to use words such as "p***y," "c**t," and "f**k," but he does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter, in contravention of the College's sexual harassment policy."[49] The Court remarked that, "[w]hile a professor's right to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment."[50]

In a subsequent case, the plaintiff's gratuitous use of in-class vulgarity was distinguished from speech that, while offensive to some, was germane to the course material and therefore protected by the First Amendment.[51] The instructor had given a lecture about language and social constructivism in order to show students the way in which language is used to marginalize minorities and other oppressed groups of society.[52] The students were then engaged in a classroom discussion analyzing the effect of oppressive and demeaning words such as "n*****r" and "b***h."[53] Subsequently, one of the instructor's African-American students complained to her minister, a local civil-rights activist, who, in turn threatened the school with a decline in African-American enrollment if the dispute was not resolved in the student's favor. The President and Dean obliged, and the instructor's teaching contract was not renewed.

The court held that the use of "socially controversial words," along with "racial and gender epithets in an academic context designed to analyze the impact of these words upon societal relations, touched upon a matter of public concern and thus fell within the First Amendment's protection."[54] Furthermore, the court ruled that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." [55] In addition, the teacher's actions did not have an impact on the governance or operation of the school, thus satisfying the balancing tests other prong.

What about a faculty member who makes off color jokes; uses sexual innuendo around students and makes comments such as "he wanted to "get his hands" on one graduate student and "get naked" or "drink some good beer" with another? These statements by a non-tenured probationary faculty member were held to be in the faculty member's personal interest. "The statements were simply parts of a calculated type of speech designed to further Trejo's private interests in attempting to solicit female companionship and, at the same time, possibly to irritate the other graduate students to whom

he was speaking." [56] As such they were completely unprotected by the First Amendment and the actions taken against him by the administration were upheld.

PART II. STUDENT FIRST AMENDMENT RIGHTS.

The rights of students in the classroom was enunciated in the seminal case *Tinker v. Des Moines Independent Community School Dist.* [57] Set during the political turmoil of the 1960's, Tinker involved high school students suspended from school for wearing black arm bands. The court set out a balancing test to be employed in instances when First Amendment rights clash with the need to maintain order in schools. In the now famous pronouncement, the court stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."[58]

On the other hand, it is equally important for schools to maintain order in the schools if for no other reason than the safety of the students. Therefore, the courts also acknowledge the need to allow schools "to prescribe and control conduct in the schools." [59]

A classic example of the court's reasoning is evidenced in *Salehpour v. University of Tennessee* [60] Here, a dental student refused to follow the professor's classroom rule 'barring first-year dental students from sitting in the last row of their classrooms.' On one particular day, the professor asked the student to move in the presence of a guest lecturer. "Plaintiff replied that he was comfortable where he was sitting and did not wish to move. Dr. Fletcher informed Plaintiff that if he did not move to another seat, he would have to leave the class." [61] The lawsuit that ensued included allegations "that he was

discriminated against because of his national origin, physical disability, and protest against the classroom rule prohibiting first-year dental students from sitting in the last row of certain classes." [62]

Citing *Tinker*, the court noted that, "conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." As such, we find that, here, Plaintiff's claim fails at the inception where his alleged speech, i.e., his conduct of disrupting the classroom milieu for the sole purpose of advancing and pursuing his admitted "power struggle" with the University, was not protected activity.[63]

It is interesting to note that few cases exist that examine the tension between faculty and students in the classroom. In *Brown v. Li*, [64]however, the court acknowledged that neither the courts or the parties had found any Supreme Court case discussing the appropriate standard for reviewing a university's regulation of students' *curricular* speech

As a general rule, however, the court found that United States Supreme Court sentiment that "the curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere."[65] Therefore, when the student submitted his thesis and attached to it a "Disacknowledgment" which began "I would like to offer special *F*** You's* to the following degenerates for being an ever-present hindrance during my graduate career····" It then identified the Dean and staff of the graduate school, the managers of Davidson Library, former California Governor

Wilson, the Regents of the University of California, and "Science" as having been particularly obstructive to Plaintiff's progress toward his graduate degree. The dean then wrote a letter to Plaintiff, informing him that his degree would be conferred upon the approval of his thesis. The letter further noted that approval would be forthcoming as soon as Plaintiff removed his "Disacknowledgements."[66]

The court found that no First Amendment violation existed but rather this was a clear pedagogical decision by the university and the university set the standard.

> ... Plaintiff's thesis was subject to a reviewing committee's reasonable regulation. Plaintiff was given reasonable standards for that assignment, including a pedagogically appropriate requirement that the thesis comply with professional standards governing his discipline. He was instructed that he should consult a standard style manual, or talk with members of his committee, about those requirements...Plaintiff's committee members acted well within their discretion, and in conformity with the First Amendment, when they declined to approve the noncompliant section. Their decision was reasonably related to a legitimate pedagogical objective: teaching Plaintiff the proper format for a scientific paper.

With few cases to rely upon to answer questions regarding classroom behavior at the college and university level, this case contains especially helpful language.

What if the student's first amendment rights are infringed by an in-classroom activity? In *Axson-Flynn v. Johnson* [67] a

student in the University of Utah's actor training program and a devout Mormon argued that making her say the "F" word as part of a script violated her religious beliefs. As a result, she dropped out of the program and then sued for deprivation of her civil rights.

The court found that as long as there was a relationship between the pedagogy and the goals of the course, then the language was justified. "The school's methodology may not be *necessary* to the achievement of its goals and it may not even be the most effective means of teaching, but it can still be "reasonably related" to pedagogical concerns. A more stringent standard would effectively give each student veto power over curricular requirements, subjecting the curricular decisions of teachers to the whims of what a particular student does or does not feel like learning on a given day. This we decline to do."[68]

Nevertheless, the court wondered if the use of such language was in fact a pretext to discriminate against her on the basis of religion, or an 'anti- Mormon sentiment.' "Viewing the evidence in a light most favorable to Axson-Flynn, we find that there is a genuine issue of material fact as to whether Defendants' justification for the script adherence requirement was truly pedagogical or whether it was a pretext for religious discrimination"[69] thereby reversing and remanding the decision for further deliberation.

CONCLUSION

The foregoing review of the case law on faculty and student first amendment rights in the classroom provides some comforting safe havens and guidelines, but it also indicates a disconcerting undercurrent of subjectivity that may undermine free speech in academia. It seems reasonable that both faculty and students have no right to engage in gratuitous profanity in

the classroom, that a modicum of decorum should be maintained. Nor should faculty *require* students to participate in potentially dangerous demonstrations in furtherance of their own political viewpoints. But some faculty, particularly those not tenured, may abridge their speech for fear of reprisals. After *Hudson,* would a professor be at risk is she encouraged her students to become informed citizens and to engage in participatory democracy by checking out the campus sit-in? And after *Bonnell*, should speech, media, language, and English professors refrain from the study of inflammatory Literature for fear that some may take offense? Perhaps most disturbing is the courts willingness in *Axson-Flynn* to allow a jury to review a script to determine if the use of a swear word was actually a pretext for religious discrimination. If the university is to remain Justice Brennan's ideal "marketplace of ideas", it cannot be pre-sanitized.

ENDNOTES

1 *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590 (6th Cir. 2005)

2 Cameron, C., Meyers, L., and Olswang, S., Academic Bills of Rights: Conflict in the Classroom, 31 Journal of College and University Law 243, 251. (2005)

3 *Id.*

4 Martin v. Parris, 805 F.2d 583, 584 (5th Cir. 1986).

5 Eisenstein, K., *First Amendment Protected Speech in an Academic Environment*, 80 University of Detroit Mercy Law Review 275, 277 (Winter 2003).

6 391 U.S. 563, 88 S.Ct. 1731, 1 IER Cases 8, 20 L.Ed.2d 811 (1968)

7 *Id.* at 568

8 *Id.*

9 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967)

10 385 U.S. at 603

11 *Id.*

12 *Id.*

13 *Id.* at 1202

14 "[T]o assess the extent to which a state may regulate the speech of its employees, courts must balance 'the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " Morris v. Lindau, 196 F.3d 102, 109-110 (2d Cir.1999) (quoting Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)). "Before this balancing test is reached," a court must first assess whether the plaintiff has "initially demonstrate[d] by a preponderance of the evidence that: (1)[her] speech was constitutionally protected, (2)[s]he suffered an adverse employment decision, and (3) a causal connection exists between [her] speech and the adverse employment determination against [her], so that it can be said that [her] speech was a motivating factor in the determination." Id. at 110 (citing Mount Healthy City Sch. Dist. Bd. of

Educ. v. Doyle, 429 U.S. 274, 283-87, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)). Once this burden is met, "the defendant has an opportunity to show by a preponderance of the evidence that it would have taken the same adverse employment action 'even in the absence of the protected conduct.' "

15 *Blum v. Schlegel*, 830 F.Supp. 712, 85 Ed. Law Rep. 1109, (W.D.N.Y.1993).

16 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983))

17 *Id* at 1691

18 *Id.* at 1684.

19 *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir.1983)

20 *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir.1988)

21 *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir.1996).

22 *Hulen v. Yates*, 322 F.3d. 1229 (Tenth Cir. 2003).

23 *Id.*

24 *Id.* at 1238.

25 *Id.*

26 *Id.* at 1233.

27 *Id* at 1238.

28 830 F.Supp. 712 (W.D.N.Y.1993)

29 *Id* at 731.

30 403 F.3d 691 (Ninth Cir. 2005).

31 *Id.* at 700

32 *Id.*

33 *Id.*

34 282 F. 3d. 1031 (8th Cir. 2002)

35 *Id.* at 1037

36 *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878 (1994).

37 *Id.* at 674.

38 114 S.Ct. at 1887, 1890.

39 52 F.3d 9 (2nd Cir. 1995.)

40 *Id.* at 11.

41 *Id.*

42 *Id.* at 585.

43 *Id.*

44"There is no doubt that Martin's epithets did not address a matter of public concern. One student described Martin's June 19, 1984, castigation of the class as an explosion, an unprovoked, extremely offensive, downgrading of the entire class. In highly derogatory and indecent terms, Martin implied that the students were inferior because they were accustomed to taking courses from inferior, part-time instructors at Midland College. The profanity described Martin's attitude toward his students, hardly a matter that, but for this lawsuit, would occasion public discussion. Appellant has not argued that his profanity was for any purpose other than cussing out his students as an expression of frustration with their progress-to "motivate" them-and has thereby impliedly conceded his case under Connick. Id.

45 241 F.3d 800, 2001 Fed.App. 0057P, 151 Ed. Law Rep. 387, 142 Lab.Cas. P 59,159 (2001)

46 *Id.* at 803.

47 *Id.*

48 *Id.* at 811.

49 *Id.*

50 *Id.* at 825.

51 *Hardy v. Jefferson Community College*, 260 F.3d 671, 17 IER Cases 1523, 156 Ed. Law Rep. 415, 2001 Fed.App. 0267P, 144 Lab.Cas. P 59, 418 (6th Cir. 2001)

52 *Id.* at 674.

53 *Id.*

54 *Id.*

55 *Id.* citing Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)

56 *Trejo v. Shoben*, 319 F.3d 878 (7th Cir. 2003)

57 393 U.S. 503, 89 S.Ct. 733, 49 O.O.2d 222, 21 L.Ed.2d 731 (1969)

58 *Id.* at 735

59 *Id.* at 737.

60 159 F.3d 199 (6th Cir. 1998)

61 *Id.* at 201-202.

62 *Id.* at 203.

63 *Id.* at 206.

64 308 F.3d 939 (2002)

65 *Id.* at 951

66 *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002).

67 356 F..3d 1277 (10th Cir. 2004)

68 *Id.* at 1290.

69 *Id.*

THEY EAT HORSES, DON'T THEY? THE AMERICAN HORSE SLAUGHTER PREVENTION ACT

by

Donna Sims*

"*The measure of a society is how well it treats its animals.*"[1]
Barbara Righton

I. INTRODUCTION

Congress has historically exhibited a significant interest in the welfare of the nation's horses. The recent debate over attempts to end the slaughtering of horses in the United States that are exported for consumption to Europe and Japan has ended at least temporarily, in a modern coup d'e'tat pitting Congress and numerous animal welfare groups, against the United States Department of Agriculture (USDA)[2]. The losers unfortunately, in this ongoing battle of wills are the 80,000 horses slated for slaughter at three U.S. slaughterhouses which continue in operation despite the clear intent of Congress.

II. BACKGROUND

The horse has a long and intimate history with mankind in general and in particular with the development of the Americas. The Western Hemisphere had not seen horses since the end of the Ice Age (circa 10,000 B.C.). Christopher

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